GEORGE BARINGTANG AUGUSTINE BARINGTANG *a*

v.

GOVERNMENT OF THE FEDERATION OF MALAYSIA

HIGH COURT SABAH & SARAWAK, KOTA KINABALU *b*
RICHARD MALANJUM J
[CIVIL SUIT NO: K 22-192 OF 1994]
10 OCTOBER 1997

ADMINISTRATIVE LAW: *Rights and liabilities of public servants - Dismissal - Whether plaintiff wrongfully dismissed - Whether directive from Station Head binding on plaintiff - Whether defendant's reliance on minutes of meetings to substantiate allegation reasonable* *c*

The plaintiff was alleged to have failed in his duties by not being physically present to examine and supervise the examination of containers on 12 April 1989. The plaintiff in his claim for wrongful dismissal alleged that he was not required to be present for such examinations and relied on a desk file containing the plaintiff's scope of duties, responsibilities and powers as a superintendent of customs, and which did not contain such a duty. The defendants in their defence alleged that the plaintiff was not confined to the scope of duties contained in the desk file but was also subject to express instructions and directions issued at monthly meetings, and relied on the minutes of three such monthly meetings. The plaintiff applied for declarations, *inter alia,* that his dismissal was wrongful and for reinstatement. The issues were: (i) whether there was any specific instruction or directive which required the plaintiff to be present at physical examinations of goods or containers; and (ii) if so, whether the plaintiff had, by signing the relevant customs declaration forms without having attended such examinations, disregarded such instructions. *d* *e* *f*

Held: *g*

[1] The minutes of the first monthly meeting in February 1987 showed that the station head emphasised that senior officers of the warehouse and preventive sections had to be present at every container examination but the directive was temporary in nature in view of the phrases used. It was unclear whether the directive continued until 1989 and as the plaintiff was not holding the post of superintendent at the material time the monthly meetings were held, it was unreasonable to expect him to know that he was bound by it. The directive being penal in nature, the plaintiff should have been given the benefit of the doubt. *h*

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[2] The desk file of the plaintiff did not contain any directive or instruction from the Station Head and there was also no evidence to show that the plaintiff was informed of the continuation of the directive.

[3] The minutes of the three meetings relied upon by the defendants to substantiate their allegations were either lacking in form of directives or instructions or inapplicable due to subsequent events or were ambiguous. As there was no specific directive which the plaintiff could be said to have infringed, his dismissal could not be sustained.

[4] The plaintiff was therefore granted a declaration that his dismissal was wrongful and without just cause and excuse and was entitled to reinstatement as a superintendent of customs without any loss of wages, allowances, seniority and benefits.

Obiter

[1] It was not in dispute that only a section head could issue a directive or instruction and that an acting superintendent could not give a directive to another superintendent in a substantive post. As such, even if the minutes of the second meeting could be said to contain reference to a directive or instruction, the plaintiff was not bound by it as the officer who issued the directive was only an acting superintendent while the plaintiff was already holding the substantive post of superintendent.

[Plaintiff's application allowed.]

Cases referred to:

Harris Solid State (M) Sdn Bhd & 2 Ors v. Bruno Gentil Pereira & 21 Ors [1996] 4 CLJ 747 ***(refd)***

Hoh Kiang Ngan v. Mahkamah Perusahaan Malaysia & Anor [1996] 4 CLJ 687 ***(refd)***

Ng Hong Choon v. Timbalan Menteri Hal Ehwal Dalam Negeri & Anor [1994] 4 CLJ 47 ***(foll)***

Rama Chandran v. The Industrial Court of Malaysia [1997] 1 CLJ 147 ***(refd)***

Reardon-Smith Line Ltd v. Hansen-Tangen [1976] 1 WLR 989 ***(refd)***

Summit Investment Inc v. British Steel Corpn [1987] 1 Lloyd's Rep 230 ***(refd)***

Tan Cheng Hock v. Chan Thean Soo & Anor [1987] 2 MLJ 479 ***(refd)***

Legislation referred to:

Customs Act 1967, s. 3(3)

For the plaintiff - Sugumar Balakrishnan; M/s Sugumar & Co
For the defendant - Alaudin Ismail, SFC, Royal Customs and Excise Dept

Reported by Anne Khoo

JUDGMENT

Richard Malanjum J:

The Action

In this action the plaintiffs is alleging that his dismissal from his employment as a Superintendent of Customs with the Royal Customs and Excise Department, Sabah on the 30 August 1994 was "wrongful and without just cause or excuse and is therefore void, inoperative and of no effect." He therefore prays for the following as amended (verbatim):

1. A declaration that the Plaintiff's dismissal as Superintendent of Customs with effect from 30/08/94 was wrongful and without just cause or excuse and is therefore null and void, inoperative and of no effect;

2. An Order directing the Defendants to reinstate the Plaintiff as Superintendent of Customs without any loss of wages, allowances, service seniority and benefits monetary or otherwise;

3. In the alternative, a declaration that the Plaintiff is entitled to reinstatement as Superintendent of Customs without any loss of wages, allowances, service seniority and benefits monetary or otherwise;

4. Alternatively, damages for wrongful dismissal as Superintendent of Customs together with interest thereon from 30/08/94 at a rate to be determined by this Honourable Court pursuant to Section 11 of the Civil Law Act 1956;

5. Costs;

6. Further or other relief as this Honourable Court may deem fit to grant.

The defendants deny the claim contending that the dismissal was "valid and justified and that the dismissal was made in accordance with law".

The Background Undisputed Facts

There is no dispute by the defendants on several of the averments raised by the plaintiff in his Amended Statement of Claim, namely, (verbatim):

1. The Plaintiff was at all material times employed by the Defendants as a Superintendent of Customs under the permanent and pensionable scheme.

2. The Plaintiff commenced his employment with the Customs and Excise Department, Sabah on 02/06/69 as a division III customs officer in Kota Kinabalu. Upon successful completion of the Plaintiff's 3 years probationary period, the Plaintiff was absorbed into the permanent and pensionable scheme on 13/06/72 with effect from 02/06/69.

3. On 23/11/76 the Plaintiff was promoted to the post of Assistant Superintendent of Customs under scale C1, 2, 3 with effect from 01/09/75 and the Plaintiff was duly confirmed in this post with effect from 05/03/80.

4. On 19/09/81 the Plaintiff was promoted to the post of Superintendent of Customs under scale A22 with effect from 15/08/81.

5. Sometime in March, 1989 the Plaintiff was posted to the Sabah Ports Authority Warehouse in Tawau as the officer-in-charge for a period of 3 months. Thereafter, the Plaintiff was posted back to his previous posting as officer-in-charge of the petroleum licence warehouse in Tawau until 26/11/92 when the Plaintiff was transferred to Kota Kinabalu as officer-in-charge of the petroleum licence warehouse in Sepangar Bay, Kota Kinabalu.

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8. The Plaintiff received a show cause letter dated 30/12/93 from the Public Service Commission as to why the Plaintiff should not be dismissed or demoted in connection with 2 charges stated therein. The Plaintiff duly made his representations to the said 2 charges vide his letter dated 24/01/94.

9. Subsequently, the Plaintiff received another show cause letter dated 08/07/94 from the Public Service Commission as to why the Plaintiff should not be dismissed or demoted in connection with the earlier 2 charges made against him vide the Public Service Commission's letter dated 30/12/93.

10. The first charge contained in the Public Service Commission's letter dated 08/07/94 states as follows:

> Bahawa tuan, George Baringtang a/l Augustine Baringtang, yang bertugas sebagai Penguasa Kastam Gred W3, Bahagian Gudang, Jabatan Kastam dan Eksais DiRaja Tawau, Sabah, pada 12/04/1989 didapati telah gagal menghadirkan diri bagi menyaksikan dan menyelia tugas pemeriksaan secara fizikal ke atas isi kandungan tiga (3) buah kontena UFCU 3867396, XCLU 2094300 dan UFCU 618957 A yang dijalankan oleh seorang pegawai di bawah seliaan tuan iaitu Encik Landasan bin Tumibil, Pegawai Kastam Tingkatan Biasa. Tuan sebaliknya telah menandatangani dan mengesahkan catatan laporan pemeriksaan yang dibuat oleh Pegawai Kastam berkenaan di atas Borang Pengakuan Barang-barang Yang Diimport yang bernombor pendaftaran 00006825, 00006836 dan 00006840. Mengikut peraturan yang di tetapkan oleh Jabatan tuan,

tuan selaku penguasa Kastam Bahagian Gudang dikehendaki hadir pada setiap masa untuk urusan pemeriksaan ke atas isi kandungan sesebuah kontena yang dijalankan. Dengan perbuatan tuan itu, tuan telah melakukan kesalahan yang boleh diertikan sebagai tidak bertanggung jawab dan ingkar perintah atau berkelakuan dengan apa-apa cara yang boleh ditafsirkan dengan munasabah sebagai ingkar perintah iaitu bertentangan dengan Peraturan 4(2)(g) dan 4(2)(i), Peraturan-peraturan Pegawai Awam (Kelakuan dan Tatatertib), 1993.

11. The second charge contained in the Public Service Commission's letter dated 08/07/94 states as follows:

> Bahawa tuan, George Baringtang a/l Augustine Baringtang, yang bertugas sebagai Penguasa Kastam Gred W3, Bahagian Gudang, Jabatan Kastam dan Eksais DiRaja Tawau, Sabah, pada 12/04/1989 didapati telah gagal menghadirkan diri bagi menyaksikan dan menyelia tugas pemeriksaan secara fizikal ke atas isi kandungan dua (2) buah kontena UFCU 6172495 dan ITLU 6411945 yang dijalankan oleh seorang pegawai di bawah seliaan tuan iaitu Encik Chung Vui Pen, Pegawai Kastam Tingkatan Biasa. Tuan sebaliknya telah menandatangani dan mengesahkan cacatan laporan pemeriksaan yang dibuat oleh Pegawai Kastam berkenaan di atas Borang Pengakuaan Barang-barang Yang Diimport yang bernombor pendaftaran 00006832 dan 00006843. Mengikut peraturan yang ditetapkan oleh Jabatan tuan, tuan selaku Penguasa Kastam Bahagian Gudang dikehendaki hadir pada setiap masa untuk urusan pemeriksaan ke atas isi kandungan sesebuah kontena yang dijalankan. Dengan perbuatan tuan itu, tuan telah melakukan kesalahan yang boleh diertikan sebagai tidak bertanggungjawab dan ingkar perintah dan berkelakuan dengan apa-apa cara yang boleh ditafsirkan dengan munasabah sebagai ingkar perintah iaitu bertentangan dengan Peraturan 4(2)(g) dan 4(2)(i), Peraturan-peraturan Pegawai Awam (Kelakuan dan Tatatertib), 1993.

12. The Plaintiff duly made his representations to the said 2 charges contained in the Public Service Commission's letter dated 08/07/94 vide his letter dated 30/07/94.

13. The Public Service Commission had on 29/08/94 decided to dismiss the Plaintiff from his employment with effect from 30/08/94 and the aforesaid decision was conveyed to the Plaintiff vide the Public Service Commission's letter dated 13/09/94 and the Sabah Director of Customs's letter dated 24/09/94.

And whilst partially admitting para. 6 of the Amended Statement of Claim which reads:

6. In his capacity as Superintendent of Customs cum officer-in-charge of warehouse, the Plaintiff was issued with a written desk file by the Department of Customs and Excise detailing the Plaintiff's scope of duties, responsibilities and powers which shall be produced at the trial of this action.

the defendants also contend that a Superintendent of Customs cum officer-in-charge of Customs Warehouse is "not confined to the scope of duties, responsibilities and powers envisaged under the desk file only but is also subject to express instructions and directions formulated from time to time in amplification of the desk file governing his duties, responsibilities and powers." In short, it is the defendants' stand as given in answer to para. 7 of the Amended Statement of Claim that the desk file is not exhaustive of the duties and responsibilities of the plaintiff as a Superintendent of Customs in charge of the Tawau Customs Warehouse.

It should also be noted that at the out-set of the trial the parties agreed to their respective bundles of documents being admitted as exhibits both as to the existence and contents. Thus, they were therefore marked as "Exh. A" for the plaintiff and "Exh. B" for the defendants. The specific documents therein would be referred according to their page numbers in the respective exhibits.

The Disputed Facts And Issues

Briefly, the plaintiff states that he was not required at the material time by his department to be present and to examine and supervise the physical examination of containers by the examining officers. Such requirement was beyond the scope of his duties and responsibilities as provided in the desk file.

In response, the defendants contend that besides the desk file the department held monthly meetings when "regulations and instructions were formulated and given to be obeyed by all officers including the plaintiff." (as per para. 6 of the amended statement of defence).

Meanwhile, it is not denied that the plaintiff was not present during the physical examination of the goods/containers on the 12 April 1989.

Hence, the issues for consideration are as follows:

(a) whether there existed at the material time any specific instruction or directive which required the plaintiff, being the Superintendent of Customs in charge of the Tawau Customs Warehouse, to be present when physical examinations of the goods/containers were done by the examining officers; and

(b) if so, whether the act of the plaintiff in signing the customs declaration form on 12 April 1989 when he was not present during the physical examination constituted a disregard to such instruction or directive.

Issue (a): Evidence, Contentions And Findings:

(i) Plaintiff's Evidence:

It is the evidence of the plaintiff that he joined the customs department on 2 June 1969. He went through the rank and was ultimately promoted as a Superintendent of Customs. Initially, the plaintiff said that from March 1989 to November 1992 he was the Superintendent of Customs attached to the Customs Warehouse, Tawau. However, later on, the plaintiff said that he ceased to be the officer-in-charge of the Warehouse on 1 May 1989. Encik Haji Mohd. Noor took over from him.

Anyway, according to the plaintiff he took over from one Hasbollah Yahya (DW.1) in the Customs Warehouse. During the handing-over of duties he said that he only received a desk file from DW1. And the plaintiff proceeded to outline his responsibilities as the officer-in-charge of the Customs Warehouse, namely:

(a) to assign customs officers under his control to conduct physical examination on goods which had been declared in the Customs Declaration Form;

(b) after examination, he would check the examination report prepared by the customs officers who did the physical examination against the Declaration Form. If he found the certification of the customs officers to be correct he would counter-sign the report; and

(c) to sign the Customs Declaration Form before transmitting it to the Preventive Section of the Customs Department.

According to the plaintiff, on 12 April 1989 he had 4 examining customs officers attached to the Tawau Customs Warehouse. On that day he received the examination report of one Encik Landasan. As he was satisfied with the report he proceeded to counter-sign it. He also signed the Declaration Form before passing it to the Preventive Section.

It was also the evidence of the plaintiff that on 12 April 1989 there was neither a Preventive nor an Assessment Officer present at the Customs Warehouse when Encik Landasan made the physical examination. And he named those officers as Encik Jonas Kimsin and Encik Yunus Tahir (DW2) from the Preventive and Assessment Sections respectively. In fact the plaintiff frankly declared that from March 1989 to 26 November 1992 he never witnessed or

supervised any physical examination of containers by customs examining officers. And he was not aware if the Preventive and Assessment Officers were present during any of such examinations.

Prior to his transfer to the Customs Warehouse the plaintiff said that he was an Assessment Officer. DW1 who was his junior in service and rank was then in charge of the Customs Warehouse. And it was his assertion that when he assumed the post of Superintendent of Customs cum Officer-in-charge of the Customs Warehouse in March 1989 and even up to 12 April 1989, he did not receive any oral or written instruction from his superior requiring him to witness and supervise the physical examination of containers by customs examining officers.

The plaintiff also referred to the show-cause letters issued by the Public Service Commission which he replied. The result of that exchanges were that his service was terminated.

Under cross-examination, the plaintiff was referred to several minutes of meetings. He admitted that he was present in those meetings, namely, on the 14 February 1987 (1st meeting), 25 June 1988 (2nd meeting) and 28 July 1988 (3rd meeting) respectively. But he disputed para. 4.10 of the minutes of the third meeting.

According to the plaintiff there was a discussion of the minutes. And he denied ever receiving any directive pertaining to the Customs Warehouse besides the desk file. He said that he would have complied if directed by his superior. As such he disagreed that he acted irresponsibly or in-subordination to his superior.

In re-examination the plaintiff proceeded to clarify that during the three meetings he was still the assessment officer. He was not required to be present during the examination of the containers. The plaintiff said that the desk file did not contain any of the alleged directives when he received it from DW1 even although it was given after those meetings. Neither did he receive any directive subsequently.

Finally, the plaintiff said that prior to his dismissal there was no disciplinary action ever taken against him.

The plaintiff called two other witnesses in his endeavour to establish his case.

Datuk Hajiji bin Hj. Noor (PW1) testified that he took over from the plaintiff as the Superintendent of the Customs Warehouse, Tawau. He was given the desk file when he assumed the post by the plaintiff. And this witness said that the desk file contained the duties. He said that as the Customs

Superintendent of the Customs Warehouse he was not required to be present while an examining officer did the physical examination of containers at the Warehouse. He was only to sign on the examination report. However, this witness could not remember if he was required to sign the declaration form.

When cross-examined PW1 said that he worked for 3½ years as a Customs Superintendent in Tawau, ie, from the end of 1986 to April 1990. He also admitted that he was present during the second meeting. He was then the Customs Superintendent for MAS Cargo.

This witness was also referred to para. 4.11 of the minutes of the second meeting. He agreed the existence of that paragraph but clarified that he could not remember if it was true or not. And he went on to say that the minutes reflected the view and suggestion/report of the Superintendent at that time.

The next witness called, PW3, Encik Aminuddin bin Nuruddin, was the Director of Customs Department, Sabah. In his evidence in chief he stated the following:

(i) that the plaintiff had no other disciplinary problem before;

(ii) that a desk file has the following purposes:

(a) to act as a guide for officers to carry out their duties efficiently and effectively; and

(b) to serve as a guide to officers who have been transferred to new posts. And further, to inform such officers of their duties, responsibilities and powers in the new posts.

(iii) that any changes in a desk file have to be in the form of directives from a section head. Such directive can be in writing or oral; and

(iv) that changes in a desk file depend on the situation. If the changes take place before a desk file is handed over to an officer, such directives should have been incorporated.

While under cross-examination PW3 gave the following replies:

(a) that the administration and business of the Customs Department for Tawau Division comes under a Customs Department Station Head bearing the rank of Senior Assistant Director of Customs;

(b) that the Tawau Division Station Head, for the purpose of smooth implementation of works, can issue directives related the business and administration of the Station. Such directives can be either in writing or oral. They can also be in the form of decisions made during meetings;

(c) that the powers of the Director-General of Customs Department can be delegated to certain officers, including a Senior Assistant Director, pursuant to s. 3(3) of the Customs Act 1967;

(d) that directives issued by the station head must be obeyed by a Superintendent even though such directives may not be in the desk file; and

(e) that any decision taken during a meeting convened to consider an important issue or problem becomes a directive for officers to implement. Failure to comply may result in action being taken.

In a short re-examination PW3 confirmed that the powers of the director-general cannot be delegated to a superintendent of customs. He also said that directives should come from a senior officer to a junior officer. As such an acting superintendent cannot give any directive to another superintendent in substantive post.

Defendants' Evidence

In support of their stand, the defendants called 3 witnesses to testify.

DW1, Hasbullah bin Yahya, was the predecessor of the plaintiff as the Superintendent of the Customs Warehouse, Tawau. He was on the post from February 1987 to February 1989. He was the Section Head. And DW1 outlined his duties whilst at the customs warehouse as follows:

> to attend and supervise the examination of goods at the Warehouse by assigned customs officers. The Customs Superintendent for Preventive and Assessment Sections were also required to be present.

DW1 went on to state the source of such a requirement and its purpose. He said that the procedure came from the Head of the Tawau station during the monthly action meetings. He was a member and therefore attended such meetings. This witness was therefore shown the minutes of the second meeting. He admitted he was present and at that time he was in charge of the Customs Warehouse. When referred to para. 14.11 of the minutes, DW1 said that for the Warehouse it was decided, *inter alia*, that imported goods in containers and boxes had to be examined by a committee comprising of the Superintendent for the Preventive Section or his representative as well as the superintendents for the Assessment and Warehouse Sections respectively. According to DW1 such procedure of examination was decided by the Station Head, Tawau.

In respect of the third meeting, DW1 testified that the meeting decided as per para. 4.10 of the minutes. He said that the chairman of the meeting directed that the works undertaken by the committee had to be continued or further improved and to be performed as best as possible. This witness also disclosed that after the meeting he received a copy of the minutes.

As for the purpose of the examination, DW1 said that it was to determine that the quantities and types of goods were as per declared. And DW1 stated that it was the responsibility of the Superintendent for the Customs Warehouse to call the Superintendents for the Preventive and Assessment Sections to attend the examination of the goods. The reason being that the offices of the latters were outside the Warehouse compound.

In respect of the period after he was transferred out of the Warehouse Section, DW1 said that he was in the Assessment Section, Tawau. While there he was called to do the examination of the containers in the Warehouse. But he was not sure if the plaintiff called him for the examination.

When asked about the handing-over to the plaintiff, DW1 replied that it was as usual where he handed over the desk file for the Warehouse Section to his successor. And he added that he remembered explaining to the plaintiff the work procedure in the warehouse.

But under cross-examination, DW1 gave answers some of which were either contradictory to his earlier evidence or plain uncertain.

In describing what he explained to the plaintiff, DW1 said that he told him on the activity of the committee and that it was his duty to call the other Superintendents for the examination of goods. But DW1 was quick to say that it was not a directive to the plaintiff. He said that he was not in a position to do so being only acting as a Superintendent while the plaintiff was on a substantive post.

And when he was referred to para 4.11 of the minutes of the second meeting, DW1 said that that paragraph did not state any directive from the Station Head which demanded that examination of goods had to be done by a committee comprising of the Superintendents for the Customs Warehouse, Assessment and Preventive Sections. DW1 went on to say that para. 4.11 was only his explanation to those present at the meeting. And he denied that he made a suggestion contrary to the directive of the Station Head. But as far as he could remember there was one directive whereby the respective Superintendents for the Warehouse, Assessment and Preventive Sections had to be present during the examination of containers.

To another question, this witness disclosed that usually it was the Superintendent for the Assessment Section who would first have to issue an instruction to examine the containers.

DW1 was then asked about what he said to the plaintiff during the handing-over of duties. According to him he only reminded the plaintiff that he had to call the other members of the committee when there was an examination to be done. DW1 added that any member of the committee knew that he would be called when there was an examination to be done. Yet, contrary to his earlier evidence, DW1 admitted that he could not remember going to the Warehouse to do an examination when he became a Superintendent in the Assessment Section. He said that the plaintiff did not call him. He also admitted that he was not present during the examination on 12 April 1989. But he said that it was possible that the plaintiff called the Superintendent in the Assessment Section who issued the instruction to examine. DW1 agreed that there must have been examinations of goods when the plaintiff was the Superintendent for the Warehouse.

In respect of the ad-hoc procedure stated in sub-para. 10(5) of the minutes of the first meeting, DW1 said that he did not know how long it was in use.

On questions pertaining to the desk file, DW1 gave the following answers:

(a) that he agreed that even if there were directives found in Exh. B i.e. the minutes of the three meetings, none was incorporated in the desk file;

(b) that he agreed that if there were directives in Exh. B, they would have been made or issued before the desk file was handed over to the plaintiff;

(c) that probably he forgot to add or amend the desk file concerning those directives;

(d) that he agreed that amendments should have been made in the desk file;

(e) that he agreed that there was no directive of any sort given prior to the handing over of the desk file to the plaintiff and that explained the absence of any new directive in it;

(f) that he was guided by the desk file. But should there be any directive from the Station Head, orally or through a meeting, it must be complied with. An officer should find out himself what the directives were; and

(g) that he handed over the desk file to the plaintiff in accordance with the usual practice.

In re-examination DW1 seemed to portray a different impression. He was certain that while he was in charge of the Warehouse there was a directive issued by the Station Head requiring the respective Superintendents for Warehouse, Assessment and Preventive Sections to be present during examinations of containers. And he proceeded to say that it was his

responsibility to report as per para. 4.10 of the minutes of the third meeting regarding the activities of the committee. He reiterated that the examinations of containers were conducted due to the directive of the Tawau Station Head.

When referred again to para. 4.11 of the minutes of the second meeting, DW1 this time appeared to remember that there was such a directive issued. Even in the minutes of the first meeting which he did not attend this witness said that there was a directive.

To justify the absence of the alleged directive in the desk file, DW1 gave two reasons, namely, (i) that such directive was already issued through the monthly action meeting; and (ii) that probably he was busy and assumed that the directive would be adhered to although it was not stated in the desk file.

Finally, as though his earlier contradictory statements were not obvious, DW1 again said that whilst serving with the Assessment Section he was called to attend examinations at the Warehouse.

The next witness called was DW2, Encik Unos Tahir @ Yunos bin Tahir. According to him he was with the Tawau Customs from October 1976 to December 1995. And from November 1988 to December 1995 he was with the Assessment Section.

When shown the minutes of the three meetings, DW2 said that the issue of examination of containers was discussed. And while he was with the Assessment Section he was called to be present during the examination of containers.

Under cross-examination DW2 gave the following responses:

(i) that he did not know when the Containers Examining Unit/Committee was formed;

(ii) that he was called by a Superintendent of the Customs Warehouse to be present during the examination of containers. However he could not remember who in particular called him as there were changes of officers. At any rate he could not remember the plaintiff ever calling him except, upon his request, to examine a vehicle;

(iii) that he agreed that there was nothing in the minutes of the meetings as per Exh. B whereby the Superintendent for the Customs Warehouse Tawau was required to call the Superintendents for the Preventive and Assessment Sections to attend the examination of containers; and

(iv) that on 12 April 1989 he was a Superintendent in the Assessment Section. Although he did not attend the examinations of the 5 containers on that day no action was taken against him.

In re-examination however, DW2 said that for examination of containers the Superintendent for the Customs Warehouse was required to call the Superintendent for Assessment Section to attend in accordance with the decision made in a meeting. Here DW2 was unclear which particular meeting he was referring. Probably he was referring to the second meeting.

The third witness for the defendants was Madrim bin Tasan (DW3). His evidence is that he was the appointed secretary for the monthly action meetings. As such he did provide copies of the minutes of the meetings to those present.

This witness also stated that he was in the Assessment Section of the Tawau Customs Department from 1985 to middle of 1987. And he claimed that while in that section he was called to be present during the examination of containers together with the Superintendents for the Warehouse and the Preventive Sections. At that time he said that DW1 was the Superintendent for the Warehouse.

When cross-examined, DW3 asserted that the minutes were confirmed by the chairman although they were not signed. He explained that it was one of the agendas of any of the meetings that the minutes of the previous meeting had to be confirmed. However for the minutes of the third meeting DW3 agreed that it could not be established whether it was correct or not as it had not been confirmed. And as for para. 10(5) of the minutes of the first meeting, DW3 agreed that it did not say that the Superintendent for the Assessment Section had to be present during an examination of containers. DW3 further agreed that no directive could be found or construed in Exh. B.

Contentions And Findings

In submitting for the defendants learned Senior Federal Counsel (SFC) relied heavily on the minutes of the three meetings as found in Exh. B. It was his contention that in those relevant paragraphs of the minutes the station head had issued a directive requiring the Superintendents for the Warehouse, Preventive and Assessment Sections respectively to be present during the physical examinations of containers in the Customs Warehouse. And according to learned SFC the existence of such a directive had been supported by the oral testimonies of DW1, DW2, DW3 and even PW1. Learned SFC also submitted that the Tawau Station Head was empowered to issue directives on

the operation and administration of his station. On that point there is no dispute. But the crux of the matter before me is whether in fact there was a directive issued.

On the other hand, learned counsel for the plaintiff relied on the following points namely, in summary:

(a) that there was nothing in the desk file given to the plaintiff stipulating the alleged directive. Further, inspite of such a plea in the Amended Statement of Claim, the defendants only gave a bare denial. The plaintiff was not even cross-examined on that issue. Hence, the defendants should be barred from raising any argument on the desk file;

(b) that the action of the plaintiff did not contravene the desk file;

(c) that any directive as may be found in the minutes of the three meetings was not directed to the plaintiff at the material time simply because he was then in the assessment section which was not covered. As such, the plaintiff did not direct his mind on such an alleged directive;

(d) that the alleged directive should be construed as penal in nature in view of the consequence to the plaintiff if he was found to have disobeyed it. Hence, a strict and narrow interpretation of it is necessary. And any doubt should be given to the plaintiff;

(e) that based on sub-para. 10(5) of the minutes of the first meeting, it was unclear when the Containers Examination Committee was constituted. No evidence was adduced which was crucial since it was specified that the existing arrangement would have to continue until such a committee was formed. Further, there was nothing to indicate what the arrangement would be once the committee was formed. As such, the doubt or ambiguity should be resolved in favour of the plaintiff. Moreover, such an alleged directive appeared to have been specifically directed on other officers, i.e. the Preventive and Warehouse only and not the plaintiff who was then in the Assessment Section;

(f) that para. 4.11 of the minutes of the second meeting is not a directive or instruction of any kind. It only stated what DW1 had done and it was recorded that the chairman was satisfied with it. And in any event DW1 was not competent to give any directive to the plaintiff as he was only an acting Superintendent whilst the plaintiff was a substantive Superintendent;

(g) that para. 4.10 of the minutes of the third meeting should not be construed as a directive to the plaintiff simply because of its serious ambiguity. No evidence was adduced as to the functions of the committee besides the fact that nothing was shown when it was formed. That the reference of

"kerja-kerja" therein was not specific to include the presence of the Customs Warehouse Superintendent during physical examination of any goods; and

(h) that the validity of the minutes of the three meetings is in doubt. They were not signed and confirmed by the chairman. Thus, there is nothing to indicate that the records are correct and true of what were discussed in those meetings.

Now, from the evidence adduced for this issue (a) and the submissions of learned counsel for the parties, it is obvious that a careful scrutiny of the relevant paragraphs of those minutes of meetings is necessary. And such exercise should be carried out in the light of the testimonies of the witnesses called. I also bear in mind that in construing the meanings and intentions of those relevant paragraphs I have to view them objectively. I am not bound by the meanings or intentions given to them by the witnesses called. (See: *Summit Investment Inc. v. British Steel Corpn.* [1987] 1 Lloyd's Rep. 230; *Reardon-Smith Line Ltd v. Hansen-Tangen* [1976] 1 WLR 989).

Meanwhile, in assessing the evidence of the witnesses called I must weigh and consider them and then decide which of the versions is more probable. And I must be satisfied on the balance of probabilities that that is so. (See: *Tan Cheng Hock v. Chan Thean Soo & Anor* [1987] 2 MLJ 479).

I am also inclined to agree with the learned counsel for the plaintiff that if indeed there was a directive, it should be viewed as penal in nature due to the consequences in the event of any disobedience. And that being the case where there is a doubt it should be given in favour of the plaintiff. (See: *Ng Hong Choon v. Timbalan Menteri Hal Ehwal Dalam Negeri & Anor* [1994] 3 MLJ 285).

There is also a good reason to consider with great care the meanings and implications to be ascribed to the relevant paragraphs of those minutes of meetings. It is due to the decisions of the higher courts of this country whereby "the right to serve an employer in gainful employment was given its due recognition, not only as a proprietory right but as a fundamental right as well." (See *Harris Solid State (M) Sdn Bhd & 2 Ors. v. Bruno Gentil s/o Pereira & 21 Ors.* [1996] 3 AMR 3546). (See also *Hoh Kiang Ngan v. Mahkamah Perusahaan Malaysia & Anor* [1995] 3 MLJ 369; *Rama Chandran v. The Industrial Court of Malaysia* [1997] 1 AMR 433). A loose interpretation of them could produce a serious consequence which itself might add to an infringement of a fundamental right.

In order to better appreciate the issue at hand, it is appropriate that the relevant paragraphs of the minutes of those three meetings should be reproduced in toto:

(a) the First Meeting (14/02/1987):

Paragraph 10: **Lain-lain perkara yang berbangkit.**

Encik Jonas Kimsin membangkitkan seterusnya memohon agar dapat diadakan satu kawasan untuk membuat pemeriksaan kontena dan mencadangkan supaya dibentuk satu pasukan pemeriksaan yang terdiri dari Pegawai Kanan Bahagian Gudang, taksiran dan pencegah.

Tuan Pengerusi Majlis bertanyakan keadaan, amalan yang dibuat sekarang dan bagaimana keadaan sekiranya pemeriksaan randum dibuat terhadap kontena.

Encik Lim Lai Ting menyatakan, bahawa pemeriksaan kontena biasanya dibuat dikawasan letak kontena bagi kontena FCL dan didalam gudang bagi kontena LCL serta bergantung pada arahan yang dibuat oleh Pegawai Taksiran.

Encik Yahya Kreah menambah, mengikut pengalaman beliau sekiranya dibuat pemeriksaan secara randum, barang-barang dari kontena yang telah diperiksa akan dimuatkan terus kedalam lori dan ditarik keluar.

Tuan Pengerusi Majlis mengatakan, berhubung dengan cadangan untuk menubuhkan pasukan pemeriksaan kontena itu, nanti akan dijalankan. Tetapi buat masa ini beliau menekankan bahawa setiap pemeriksaan kontena, Pegawai Kanan Bahagian Gudang dan juga Pegawai Kanan Bahagian Pencegah mesti hadir semasa melakukan pemeriksaan.

Tindakan Pegawai Kanan Bahagian Pencegah dan Bahagian Gudang. (emphasis added).

(b) the Second Meeting (25/06/1988):

Paragraph 4.11: **Cawangan Gudang:**

Penguasa Gudang memberitahu mesyuarat bahawa terdapat hanya empat gudang berlesen yang aktif iaitu Rambay, Sim Hua Seng, Alex dan Harper. Menyentuh kerja lebihmasa, diharap semua tuntutan yang dibuat semasa kerja lebihmasa hendaklah direkod sendiri oleh ketua yang bertugas pada waktu itu juga. Ini untuk mengelak percanggahan tuntutan. *Seterusnya Penguasa Gudang mengatakan pemeriksaan barang-barang impot melalui kontena dan peti-peti oleh komiti yang terdiri dari Penguasa Pencegah/Wakil, Penguasa Taksiran dan Penguasa Gudang sendiri diteruskan.*

Pengerusi berpuashati dengan aktiviti ini. (emphasis added).

(c) the Third Meeting (28/07/1988):

Paragraph 4.10: **Gudang:**

Penguasa Gudang memberitahu mesyuarat bahawa Lembaga Pelabuhan Tawau maseh meneruskan polisi kerja terus, seterusnya berhubung dengan komiti pemeriksa barang-barang impot berjalan dengan baik.

Pengerusi mengarah agar kerja-kerja yang dibuat oleh komiti ini dipergiatkan lagi dan dibuat dengan sebaik-baiknya. (emphasis added).

In respect of para. 10 of the minutes of the first meeting, there is no doubt that the chairman of the meeting, who was also the Senior Assistant Director of Customs, Tawau and thus the Station Head, did emphasise that during every container examination the senior officers of the Warehouse and Preventive Sections must be present. But that was in February 1987 and there was nothing to indicate that such a directive would continue until revoked. Further, from that same paragraph it would appear that the directive was temporary in nature in view of the phrases used such as **"berhubong dengan cadangan untuk menubuhkan pasukan pemeriksaan kontena itu, nanti akan dijalankan."** and **"Tetapi buat masa ini beliau menekankan ..."** The formation of Containers Examination Committee was also pending which could change the directive. Therefore, since it is not clear whether such a directive continued until 1989 and binding on subsequent officers assuming the respective posts, it would be quite unreasonable to expect the plaintiff to know that he was bound by it as at 12 April 1989. After all, when it was issued, the plaintiff was not affected as he was then in the Assessment Section. Perhaps one might say that it was understood to be binding. But that would go against the rule that any doubt should go to the plaintiff since such a directive is penal in nature.

Indeed, going by the evidence of the witnesses called by the defendants, there appears to have been a change. These witnesses said that even the Superintendents for the Assessment Section were required to be present contrary to what was stated in the minutes. As such I find no evidence adduced to show that the plaintiff was informed of the continuation of the directive in its changed mode. As I find that there was a change, the question of whether sub-para. 10(5) is a directive binding upon the plaintiff becomes irrelevant.

Hence, I find that no directive arising from sub-para. 10(5) can be said to be binding upon the plaintiff as at 12 April 1989.

As for para. 4.11 of the minutes of the second meeting, a careful reading of it derives nothing more than that it was a report by the Superintendent for the Warehouse. And although the report referred to the activity of a committee, it was not indicated at all that it was performing as such pursuant to a directive

from the Station Head. Obviously the paragraph does not include any directive from the chairman of the meeting.

And even if what were said by the Superintendent for Warehouse at that time appeared to be a directive or instruction, the plaintiff was not bound by it as at that time he was already in the substantive post of Superintendent of Customs while the officer (DW1) who gave the report was only acting on the post. And it was also not in dispute that only the Station Head could issue a directive or instruction.

I am therefore in agreement with the learned counsel for the plaintiff that para. 4.11 contains no directive or instruction binding upon the plaintiff.

For para. 4.10, my careful reading of it leads me to say that it consists of a report by the Superintendent for the Customs Warehouse, Tawau and a directive from the chairman. However, there are at least two matters which make the directive ambiguous. Firstly, the then Superintendent of the Warehouse (DW1) spoke of the containers examination committee. However, besides the report nothing much was known about it. Even in his evidence DW1 did not say much on it. Nothing to indicate that this committee was well known by the relevant officers thereby having no excuse of not knowing its function and membership. There was also no evidence to show that the committee would continue to function until dissolved and that a subsequent officer assuming the post of Superintendent for the Warehouse would automatically become a member. Such a doubt becomes crucial as in this case there was a lapse of time from the third meeting to the date (12 April 1989) when the plaintiff was alleged to have failed in his duties.

Secondly, I tend to agree with learned counsel for the plaintiff that the usage of the phrase **"kerja-kerja yang dibuat oleh komiti"** implies several works. But it is unclear if that should include the physical examination of goods. Of course one could say that the phrase should be understood in view of what was reported by the then Superintendent for the Warehouse. But that would be reading it too wide and utilising the doubt against the plaintiff contrary to the rules as expounded hereinabove.

Hence, I find that the directive given by the chairman as per para. 4.10 is too vague. As such, it is unsafe to rule that as it stood it was a directive which the plaintiff was bound to comply with.

In summary, the three minutes of meetings which were relied upon by the defendants to substantiate their allegations are, in my view, either lacking in any form of directives or instructions, inapplicable due to subsequent events or plain ambiguous. Hence, it would be unreasonable to construe any of them

as directives specified and binding upon the plaintiff at the material time. And as there is no specific directive which the plaintiff can be alleged to have infringed, it is an irresistible conclusion that the action taken to dismiss him cannot be sustained.

Although the foregoing conclusion is arrived at substantially based on careful reading of those relevant paragraphs of the respective minutes, individually and in combination, I am fortified, having considered the evidence adduced on the balance of probabilities, that indeed such a conclusion is appropriate on the facts of this case. The reasons are as follows:

(i) there is no dispute that the desk file (p. 40-41 of Exh. A) which was handed over by DW1 to the plaintiff when he assumed the post did not contain any directive or instruction requiring the officer holding the post to be present when containers were examined by customs examining officers. Further, there is also no denial on the purpose of the desk file as outlined by PW3. Even DW1 admitted the need to incorporate into the desk file any directives. And DW1 further agreed that if there were directives, they would have been added into the desk file before the handing over. Incidentally, it is the defendants' case that the alleged directive was existing even before the plaintiff became the officer in charge of the Warehouse. The only explanation for the absence of such a directive in the desk file came from DW1. He said that he forgot to add it in as he was busy and in any event it was already issued through the monthly action meetings. Regrettably, I find the explanation unacceptable. For such an important matter which involved the daily work of the officer in charge of the Warehouse it could not have been easily forgotten. And as for the monthly meetings I have already discussed hereinabove the implications of the relevant paragraphs of the minutes of those meetings.

(ii) DW1 also said that he did inform the plaintiff of what were expected of him pertaining to the examination of containers. This of course implies that the directive need not be in the desk file to be effective upon the plaintiff. The plaintiff denied ever being told. Meanwhile, PW1 who took over from the plaintiff testified that there was no such directive for him to comply with. He even admitted that he never witnessed or supervised any physical examinations of containers in the Warehouse. And it was not disputed that PW1 took over around May 1989. Surely steps would have been taken by the Station Head to rectify the situation if indeed such a directive was not observed, either by directly approaching the officer concerned or to raise it during the monthly meeting. If it was due to the sheer stubbornness or insubordination of

the plaintiff that the alleged directive was not carried out, then there was no explanation why PW1 was not asked to correct the wrong. It is unfortunate that the Station Head at that time was not called to testify as he could have enlightened the Court on several crucial matters. He could have explained why the alleged directive was not issued in the form of a circular to the officers to avoid any doubt. He could have even clarified the position of PW1 and the alleged directive. Anyway, even DW1 admitted, under cross-examination, that whilst in the Assessment Section he was never called to witness any examination in the Warehouse. Now, knowing the alleged directive, surely DW1 could have sounded the alarm due to its disobedience, if not to the Station Head, then during the monthly meeting. After all it was his evidence that it was the Superintendent for the Assessment Section who would first have to issue the instruction before the examination of containers could proceed. The foregoing circumstances therefore convince me to accept that on the balance of probabilities it is more probable that the plaintiff was never told by DW1 of the existence of the alleged directive. And indeed the subsequent event after PW1 had taken over clearly made it very unsafe to rule that a specific and binding directive as alleged emanated from the minutes of the monthly meetings.

(iii) that having considered the testimony of DW1 in the light of the evidence as a whole adduced in this case, I am very much inclined to disbelieve him. My impression of him is that he was trying to portray the best image of himself. And in so doing he was prepared to make contradictory statements. For instance, he was willing to interpret the relevant paragraphs of the minutes of meetings to mean that they were directives. But as discussed hereinabove and even by DW1 when cross-examined that they were not necessarily so.

Further, at one point in his evidence DW1 said that while in the Assessment Section he did go to the Warehouse to witness the examination of containers. But under cross-examination he admitted that he could not remember going there when he was in the Assessment Section. In re-examination DW1 shifted again to his earlier assertion.

And to a question put to DW1 (verbatim):

> Put: Tiada sebarang arahan sebelum Desk file diberi kepada Plaintiff. Itulah sebab tiada arahan baru di dalam Desk file ini.

he answered:

> Ans: Saya setuju.

That shows that even DW1 appeared to be very hazy as to whether there was in fact a directive as alleged. And that increases the danger of relying on his evidence as a basis to land any conclusion in favour of the defendants on the issue at hand.

(iv) the evidence of DW2 could not be taken as helpful to the defendants' case. In the first place his testimony was substantially based on his interpretation or understanding of the relevant paragraphs of the minutes of the three meetings. I do not think I am obliged to agree with him on the meanings of those paragraphs. And although he did say that he was called to attend the examination of containers, this witness could not remember when and who called him. Further, I note that DW2 in his evidence did not specifically say that there was a directive as alleged by the defendants. At most he was prepared to say was that the subject of containers examination was discussed in the meeting. He also agreed while under cross-examination that none of the minutes of meetings stated that the Superintendent for the Customs Warehouse was required to call the Superintendents for the Preventive and Assessment Sections. Yet in his re-examination DW2 happily stated that in accordance with the decision of the meeting the Superintendent for the Customs Warehouse was obliged to call. As such the testimony of DW2 is unsafe to rely upon.

(v) it was not explained either by DW1 or DW2 why none of them ever queried the plaintiff or PW1 on their failure to call after the instructions to examine containers had been issued by the Assessment Section. It was the evidence of DW1 that his section would first have to issue the instruction. Surely, the absence of any query could be considered as a contributing factor to the non-compliance of the alleged directive. And as they claimed to have been covered by the alleged directive DW1 and DW2 should have been concerned. Their silence only adds to the doubt which I have as to the existence of the alleged directive when the plaintiff and later on, PW1 were in charge of the Customs Warehouse, Tawau.

(vi) as for the testimony of DW3 it is equally of no assistance to the defendants' case. This witness agreed, while under cross-examination, that indeed no directive could be found or construed from the documents in Exh. B.

(vii) and finally, that it is not in dispute that the respective minutes of meetings as found in Exh. B were not signed or confirmed by the chairman as correct. And although DW3 insisted that they were confirmed the documents showed otherwise. For instance, the minutes

of the first meeting remained unsigned. There was no evidence adduced that it was confirmed in a subsequent meeting. As for the minutes of the second meeting it was also not signed by the chairman although the minutes of the third meeting recorded it as confirmed. Unfortunately, the minutes of the third meeting itself was not confirmed. Indeed DW3 while under cross-examination agreed that it was not confirmed by the chairman. As such DW3 admitted that it could not be determined if the contents of the minutes were correct. That admission only goes to support the plaintiff who disputed the contents of para. 4.10. Thus, if the accuracy of those minutes is questionable that alone I think demolishes the defendants' case. Cast aside those minutes and nothing is left to reflect any traces of the alleged directive. Not even the evidence of the witnesses called as they too made substantial references to those minutes.

Meanwhile I have also considered the evidence adduced by the plaintiff in the light of the whole evidence adduced in this trial. I have to say that on the balance of probabilities I am satisfied that he has proved his case. I find no reason to disbelieve the testimony of the plaintiff. And there is no basis to find him having acted irresponsibly or insubordination to the order of his superior or such other indisciplined acts. As discussed above, I find that it has not been established that the alleged directive existed at the material time. And even if it did, there was no credible evidence to show that it was communicated and/or comprehended by the plaintiff as being bound by it. I also find the plaintiff to be consistent in his stand as first given in his representations to the Public Service Commission (Exh. A p. 29-31 and p. 35-37). Moreover, the evidence of PW1 corroborated the assertion of the plaintiff that there was no specific directive or instruction as alleged issued by the Station Head at the material time. It would be foolhardy for PW1, being an assemblyman, to openly declare what he did or failed to do at that time which would have been contrary to the alleged directive if indeed there was one issued.

Issue (b) And Other Issues

In view of my findings and conclusion on issue (a), being in the negative, I do not think it is now necessary for me to deal with this issue (b). As for the other issues such as the applicability of the 1993 Regulation, they are no longer relevant since they were not pursued.

a

Conclusion And Relief

For the reasons stated hereinabove it is therefore my conclusion that the stand taken by the defendants in this case cannot be sustained. Meanwhile I am satisfied on the balance of probabilities that the plaintiff has proved his case and should therefore be entitled to judgment in his favour.

b

Now, in his prayers for relief the plaintiff sought for declarations and specific orders. In view of the reasons in coming to my conclusion the justice of the case requires that I should exercise my discretion by granting prayers 1 and 3 as formulated in the amended statement of claim. As such I do not think it is necessary to grant prayers 2 and 4 thereof. Costs to the plaintiff to be taxed unless agreed.

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